1981

Weldon S. Abbott v. Newell Christensen and Newell Christensen v. Weldon S. Abbott : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

WELDON S. ABBOTT,	:	
Plaintiff-Appellant,	:	
vs.	:	
NEWELL CHRISTENSEN,	:	
Defendant-Respondent,	:	Case No. 17616
NEWELL CHRISTENSEN,	:	
Plaintiff-Respondent,	:	
vs.	:	
WELDON S. ABBOTT,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE
DISTRICT COURT OF DUCHESNE COUNTY
HONORABLE J. ROBERT BULLOCK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

IN THE SUPREME COURT OF THE STATE OF UTAH

WELDON S. ABBOTT, Plaintiff-Appellant, vs. NEWELL CHRISTENSEN, Defendant-Respondent,	:	Case No. 17616
NEWELL CHRISTENSEN, Plaintiff-Respondent, vs. WELDON S. ABBOTT, Defendant-Appellant.	:	

BRIEF OF APPELLANT

NATURE OF THE CASE

This appeal is from a judgment rendered in a consolidated trial of three separate actions. Two of the actions were initiated by Weldon S. Abbott, hereinafter referred to as Abbott, against Newell Christensen, hereinafter referred to as Christensen. In the first action, Abbott sought to replevin 28 head of cattle which were retained by Christensen when a joint venture involving the two parties was termin-

ated. The second action by Abbott sought to recover the sum of $29,000.00, the down payment on a real estate contract entered into between Abbott as seller and Christensen as buyer. In the third of the three actions consolidated for trial, Christensen initiated suit against Abbott seeking the reformation of a real estate sales contract, and damages for breach of contract.

Prior to the trial of the consolidated case, the parties stipulated to the appointment of a special master by the court for the purpose of determining the status of accounts between the parties. Thereafter, both the court and counsel proceeded on the basis that the action was in the nature of an accounting between the parties and their joint operations between Fall 1970 and Spring 1975.

DISPOSITION IN LOWER COURT

The consolidated case was tried on July 9, 1980, in the District Court for Duchesne County, before Judge J. Robert Bullock, without a jury. Judgment was entered on February 14, 1981 after the report and supplemental report of the special master had been filed, oral argument by counsel, and written memoranda submitted on behalf of both parties. The judgment required Abbott:

1. Based on reports of the special master, to pay $47,663.79 to Christensen,

2. To deposit 424 shares of Farnsworth Canal Irrigation Company stock in an escrow account for delivery to Christensen; and,

3. To quitclaim to Christensen, any interest he had in properties formerly used in the partnership known as the Birch No. 1 Place, Birch No. 2 Place, and the Lindsay Place.

Said judgment required Christensen:

1. To quitclaim to Abbott, any interest he had in properties formerly used in the partnership known as the Bleazard Place, the Whitehead Place, and the Taylor Place;

2. To release his claim to use of a registered brand formerly used in the partnership; and,

3. Pay Abbott the $29,000.00 down payment owed on the Lindsay Place.

In addition, the judgment affirmed Abbott's right to funds paid into escrow under a real eastate sales contract between the parties and to possession of a quarter horse mare and her colt.

RELIEF SOUGHT ON APPEAL

Appellant seeks a Judgment of this Court:

1. That the reports of the special master did not conform to the stipulation of the parties and the order of the trial court appointing him and that the Judgment awarding Christensen $47,663.79, which was based upon the reports of the special master, be reversed.

2. That this court remand the case to the trial court with instructions that the accounting give Abbott credit for his capital contributions.

3. That the Reary Place contract between the parties did not include the 424 shares of Farnsworth Canal Irrigation Company stock and that the decision of the lower court awarding said stock to Christensen be reversed.

4. That the decision of the lower court that the Zane Christensen purchase contract was not part of the joint operation of the parties be reversed and Abbott be given credit for the amount of the down payment in the joint venture accounting.

STATEMENT OF FACTS

Abbott and Christensen first met in the fall of 1970. There were discussions betweeen the parties regarding the possibility of Christensen feeding and caring for cattle that Abbott intended to acquire. At the time of the discussions, Christensen was employed by the Forest Service. (Tr. 55)

The parties agreed that Christensen would care for Abbott's cattle. In compensation, Christensen was to receive a monthly draw of $500.00 and live in a home on the Reary Place, a ranch owned by Abbott. Further, the parties agreed that Christensen would receive one-half of the net proceeds from calf sales after deducting expenses of the venture. (Tr. 55-57)

Christensen moved into the home on the Reary Place in 1971. He occupied the home as his residence from that time forward without the payment of rent. Thereafter, there were certain real estate purchases made as set forth below. (Tr. 56)

The first tract of ground purchased was the Reary property, in January of 1971. (Tr. 389) Abbott issued checks from his personal account for $29,500.00 (Plaintiff's Exhibits 48, 49, and 50), and signed a note for $14,500.00. The property was then deeded to Abbott. (Plaintiff's Exhibit 35) Included in this purchase was farm equipment, (Plaintiff's Exhibit 36) and 424 shares of Farnsworth Canal Irrigation Company stock.

The next purchase was made on April 1, 1971 of the Bleazard Ranch for a total of $165,000.00, payable $25,000.00 down, $24,000.00 from Abbott's personal account and $1,0000.00 from the Walker Bank ranch account. (Plaintiff's Exhibits 15, 51 and 52) In addition, two tracts of ground belonging to Christensen were traded to Bleazard for a credit of $35,000.00 on the contract of purchase. (Tr. 397-399) Sixty cows were also purchased from Bleazard but were not included in the sales contract. The cows were paid for separately. (Tr. 397)

The two Birch properties were purchased with funds from the Ranch Account totalling $19,140.49. (Plaintiff's

Exhibits 39, 57-61, 64) At the time Birch No. 1 was purchased, Abbott gave a personal check for approximately $11,000.00 for the balance of the down payment. (Tr. 401,402,406) The Birch estate was in probate and the check was held for about two years and when presented for payment, the bank refused to honor it. (Tr. 404) At that time, Christensen borrowed $15,000.00 from Zions Bank, which was deposited in the Zions Ranch account and from which the payment was made on the Birch No. 1. (Tr. 405)

The Taylor property was purchased January 17, 1973 by Abbott entirely from his own funds for the sum of $16,000.00. Neither water stock, machinery or cattle were included in this purchase. (Tr. 389)

The next purchase was the Lindsay Ranch on June 21, 1973, for a total price of $100,000.00. The $29,000.00 down payment was made from the Walker Bank ranch account. (Tr. 92, Plaintiff's Exhibits 16, 23, and 24) This contract included 149 head of cattle, 65 sheep and farm equipment as listed in a Bill of Sale. (Plaintiff's Exhibit 16)

The Whitehead Ranch was purchased for the sum of $105,000.00 on April 2, 1974, with the $26,000.00 down payment being made from the Walker Bank Ranch Account. (Plaintiff's Exhibits 18 and 66) The Whitehead Ranch included both cows and machinery. (Tr. 428-429)

The last real estate transaction was on June 14, 1974, when ranch property of Zane Christensen was purchased on contract for $681,000.00. The $50,000.00 down payment was made by a $30,000.00 check from the Walker Bank ranch account and $20,000.00 in checks from the Zions Bank ranch account. The contract was in both Christensen's and Abbott's names. (Plaintiff's Exhibits 14, 76, 77, 78)

Abbott and Christensen mutually agreed to terminate their operation in the spring of 1975. In accordance with their oral agreement, the parties divided the various tracts of real property. To effect the divisions, Abbott, in each instance, prepared a new contract wherein the individual who was to receive the subject real property was shown as the Buyer and the other party was shown as the Seller. (Tr. 427-428 and Plaintiff's Exhibits 62, 73, 74, and 79) The trial Court found these contracts to be fully integrated contracts. (Record- Civil No. 5800 file, page 83- FF#6)

Regarding the Reary Place and the Lindsay Place, the contracts from Abbott as Seller to Christensen as Buyer, were similar to the original purchase contracts. However, whereas the original Reary contract specifically included 424 shares of irrigation water and certain personal property the contract of sale to Christensen did not include these items. (Tr. 391-392 and Plaintiff's Exhibit 14)

In preparing the contract selling the Lindsay Place to Christensen, Abbott also excluded the personal property. The Lindsay Place contract from Abbott to Christensen recited a down payment of $29,000.00. Christensen did not pay the $29,000.00. (Record- Civil No. 5800 file, page 83, FF#9)

On November 1, 1974, also as part of the termination agreement, Abbott entered into a contract to sell the Zane Christensen Place to Christensen. (Plaintiff's Exhibit 79) Althought that contract recites a down payment of $50,000.00, Abbott never received that amount from Christensen. (Tr. 436-439)

As part of the termination agreement, Christensen cared for certain cows which belonged to Abbott. The cows were watered and fed by Christensen following termination of the venture until various dates in 1975. (Tr. 443-444) Abbott contends that Christensen did not surrender control of 60 head of cows which belonged to Abbott under the terms of the oral termination agreement. (Tr. 86-90, 101-103)

Prior to the trial, the parties stipulated to the appointment of a special master. (Record-Civil No. 5799 file, page 65). The stipulation required the special master to:

> ".... audit the documents submitted and determine as far as possible therefrom the status of accounts between the parties taking into account the relative values of the real estate in question, as well as the basis for division of profits from the cattle operation, and the division of real estate upon

termination of the venture, and the monetary and other valuable contributions made by the respective parties."

However, in making his report, the special master, as instructed by the trial court, disregarded the personal property which was distributed on termination of the venture (Tr. 515-519). Further, that report included income items which were not part of the agreed upon profit from the "sale of calves". (Record-Civil No. 6169 file, page 128).

ARGUMENT

POINT I.

IN AN EQUITY CASE, THE APPEAL MAY BE ON QUESTIONS OF BOTH LAW AND FACT. THE PROCEEDINGS IN THE TRIAL COURT WERE BASED UPON AN ACCOUNTING BETWEEN JOINT VENTURERS WHICH IS AN EQUITABLE ACTION.

The Utah Constitution states that, "In equity cases the appeal may be on questions of both law and fact. . ." Constitution of Utah, Article VIII, Section 9. This directive of the people has been codified in Rule 72(a) of the Utah Rules of Civil Procedure.

The law regarding the nature of an accounting between former members of a joint venture is well settled. This Court has recognized that such an action is in equity. Stevens v. Gray, 123 U. 395, 398, 259 P.2d 889 (1953), West v. West, 16 U.2d 411, 413, 403 P.2d 22 (1965).

In Child v. Hayward, 16 U.2d 351, 352, 400 P.2d 758 (1965), this Court announced the standard it would use in reviewing the facts:

". . .it is our duty to review the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to the findings and judgment."

Further, in reviewing equity cases:

". . .the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the Court misapplied proven facts or made findings clearly against the weight of evidence." Olinero v. Elganti, 61 U. 475, 479, 214 P. 313 (1923), Ream v. Fitzen, 581 P.2d 145, 147 (1978).

The appellant asserts that, in applying these standards, this Court will find that the evidence adduced at trial will not support the findings presented by the special master and adopted by the trial court. (Record-Civil No. 5800 file, p. 82 FF#1 and p. 127 Supplement FF#2) Nor does the evidence support the trial court's Findings of Fact numbers 2, 7, and 8 and Conclusions of Law numbers 1 and 6. (Record-Civil No. 5800 file, pp.82-84)

POINT II.

THE REPORTS OF THE SPECIAL MASTER DID NOT CONFORM TO THE STIPULATION OF THE PARTIES IN THAT THEY FAILED TO TAKE INTO ACCOUNT THE VALUES OF THE REAL ESTATE IN QUESTION, THE DIVISION OF REAL ESTATE UPON TERMINATION OF THE VENTURE, AND THE MONETARY AND OTHER VALUABLE CONTRIBUTIONS MADE BY THE RESPECTIVE PARTIES.

After consolidation of the cases and prior to trial, Abbott and Christensen stipulated to the appointment of a special master. Under the terms of the stipulation, the special master was:

> ". . .to receive and review the documentary evidence from the respective parties which evidence shall include all bills, receipts, checks, deposit slips, contracts of sale, bills of sale, prior accountings, tax returns and any other records - - - covering the joint operations . . . between the fall of 1970 and the spring of 1975." (Record- Civil No. 5799 file, p.65)

Upon completion of his audit of the documents submitted, the special master was to:

> ". . .determine as far as possible therefrom the status of accounts between the parties taking into account the relative values of real estate in question as well as the basis for division of profits from the cattle operation, and of the venture, and the monetary and other valuable contributions made by the respective parties." (Record- Civil No. 5799 file, p. 65).

After receiving documents from the parties, holding a hearing to discuss various matters, and attending court sessions, the special master produced four reports. One dated August 21, 1979, is in the envelope with the exhibits, although not so marked. The others are located in the record on appeal as follows: Report dated October 8, 1980 is in Civil No. 6169 file, p.128-130; report dated February 26, 1980 is located in Civil No. 5799 file, p. 72; and report dated February 18, 1981 is

attached to Supplement to Findings of Fact and Conclusions of Law in Civil No. 5800 file, p. 127-128).

According to the reports, the special master considered the following items in his accounting:

1. Income from the sale of calves, sheep, lambs, beef, and fill dirt;
2. Operating expenses paid to Christensen and others;
3. Wages earned by and paid to Christensen;
4. Overdraft in the Zion's First National Bank ranch account and overdraft charges on that account;
5. Contributions to the joint venture working capital made by Christensen and certain of his personal expenses;
6. Credits to Christensen for the care of Abbott's cattle after the termination of the joint venture;
7. Credits to Christensen for cattle and calves replevied by Abbott; and,
8. Credit to Abbott for the down payment due from Christensen on the Lindsay Place contract of sale.

Upon the completion of trial, the special master was directed by the Court to determine the operating capital of the joint venture. In that determination, he was to disregard Abbott's cost of money [interest expense] to acquire the land and cattle (Tr. 515) and to disregard Abbott's investment in land and cattle. (Tr. 516)

distribution of profits owing to partners, Section 48-1-37 (2), Utah Code Annotated, 1953, as amended.

Christensen argued that the distribution of joint venture real property was separate from any capital contribution and division of joint venture calves. (Tr. 106) However, inasmuch as the real property constituted part of Abbott's capital contribution (Tr. 56, 65), it is unconscionable to give Christensen credit for his capital contributions and not give Abbott credit for his capital contributions.

Appellant requests this Court to hold that the accounting made by the special master was incomplete in that it did not recognize appellant's capital contributions to the joint venture. Further, that the matter be remanded to the lower court with instructions to take appellant's capital contributions into account and recalculate the accounts of the parties in accordance with the rules of distribution in Section 48-1-37, Utah Code Annotated, 1953, as amended.

POINT III.

THE ZANE CHRISTENSEN RANCH PROPERTY WAS PURCHASED DURING THE PERIOD IN WHICH THE PARTIES WERE OPERATING THEIR JOINT VENTURE. ABBOTT SHOULD RECEIVE CREDIT IN THE JOINT VENTURE ACCOUNTING FOR MAKING THE DOWN PAYMENT.

In June of 1977, Abbott and Christensen entered into a contract, (Plaintiff's Exhibit #19) to purchase proper-

Abbott submits that the Court erred in placing these restrictions upon the special master. In support of this contention, we invite attention to the stipulation of the parties wherein the accounting was to include, "the division of real estate upon termination" and "the monetary and other valuable contributions made by the respective parties." Id. Failure to include Abbott's capital contributions while including Christensen's has lead to an inequitable result.

Abbott urges further that as a ". . .general rule applicable to dissolution in the case of a joint venture . . . in the absence of an express agreement to the contrary, the person advancing capital is entitled to its return before there is a division of income or profits." 46 Am Jur 2d 56, citing Saunders v. McDonough, 191 Ala. 119, 67 So. 591 (1914); Tiffany v. Short, 22 Cal 2d 531, 139 P.2d 939 (1943); Consolidated Fisheries Co. vs. Consolidated Soluables Co. (Sup) 35 Del. Ch. 125, 112 A.2d 30, Supp. op. 35 Del. Ch. 178, 113 A.2d 576 (1955).

This Court has held that distribution in joint venture cases is governed by the Uniform Partnership Act. See Ream v. Fitzen, at 148. Under Section 48-1-37, Utah Code Annotated, 1953, as amended, capital contributions of partners are recognized as liabilities of the partnership. As such, in distribution of partnership assets, they rank ahead of the

ty known as the Peterson Place from Zane T. Christensen and Flora Christensen. The contract called for a down payment of $200,00.00. Of that amount, $50,000.00 was receipted for in the contract. Both Abbott and Christensen signed the contract.

The $50,000.00 down payment was made in the form of three checks. Check one was written in favor of Zane Christensen in the amount of $30,000.00, dated 6-18-74, signed by Abbott and drawn on the joint venture's Walker Bank ranch account. (Plaintiff's Exhibit 76 and Tr. 434) Check two was written in favor of Zane Christensen in the amount of $15,000.00, dated 6-18-74, signed by Abbott and drawn on the joint venture's ranch account at Zion's First National Bank in Roosevelt. (Plaintiff's Exhibit 77 and Tr. 434) Check three was written in favor of Zane Christensen in the amount of $5,000.00, dated June 1974, signed by Newell Christensen, the respondent, and drawn on the joint venture's Zion's First National Bank ranch account in Roosevelt. (Plaintiff's Exhibit 78 and Tr. 434)

According to Christensen's own testimony, the Peterson Place, (also referred to at various places in the trial record as the Zane Christensen property), was operated as part of the joint venture.

"Q. Have you ever operated the land known as the Peterson Place that you bought

from Zane Christensen?

"A. Yes. We run it in 1974." (Tr. 308)

As testified to by Abbott and undisputed by Christensen, the $50,000.00 down payment on the Peterson Place was made wholly from funds supplied by Abbott. (Tr. 439) Yet, in accordance with the Court's directions, the special master ignored Abbott's capital contribution toward the Peterson Place down payment when preparing his report. (Tr. 516, 517)

In accordance with the oral termination agreement, Abbott prepared a contract of sale dated November 1, 1974 describing the Zane Christensen property from himself as seller to Newell Christensen as buyer. (Plaintiff's Exhibit 79)

The signatures of Abbott, his wife, and Christensen are all affixed to the contract. The contract recites a down payment of $200,000.00, consisting of $50,000.00 cash and a $150,000.00 note as in the original contract between the parties to this action and Zane Christensen. (Plaintiff's Exhibit 79)

Christensen, however denies ever having agreed to repay the $50,000.00 cash down payment to Abbott (Tr. 561) Christensen's other testimony on the subject of the down payment was contradictory. He testified that he already paid $25,000.00. (Tr. 210-211) And, he stated

that he had no funds of his own with which to make the required down payment. (Tr. 220)

After Abbott and Christensen entered into the contract of sale for the Zane Christensen place [Abbott to Christensen], Zane Christensen sent a letter to Abbott regarding default in payment under the terms of the contract of purchase between the joint venture and Zane Christensen. (Plaintiff's Exhibit 20) Christensen testified to receiving a similar letter. (Tr. 220) He further testified that Zane Christensen sent a second letter terminating the contract in February of 1975. (Tr. 218)

As was argued above, under Point II, to take into account the capital contributions of Christensen in preparation of the joint venture accounting while disregarding Abbott's capital contributions is unconscionable. If this result is allowed to stand, Christensen will be the benefactor of Abbott's $50,000.00 loss. First, he received property paid for by Abbott upon termination of the joint venture. Next, under the special master's report, he also receives a full return of his own capital contributions while Abbott's contributions to the joint venture's capital are completely disregarded.

In order for an equitable result to occur in this joint venture accounting, Abbott requests that this Court

remand with instructions to make a full accounting. With such full accounting to include:

1. All capital contributions made by the parties (including Abbott's $50,000.00 down payment on the Zane Christensen/Peterson Place);

2. The profits as agreed upon by the parties;

3. All expenses of the joint venture; including interest expense; and,

4. The distribution of joint venture property made at its termination.

POINT IV.

THE TESTIMONY OF THE PARTIES SUPPORTS ABBOTT'S CONTENTION THAT THE ONLY PROFITS TO BE SHARED WERE FROM THE SALE OF CALVES.

In Finding of Fact #2, the trial Court stated:

> "That the agreement under which the parties operated from 1971 until the end of December,1974, was that plaintiff was to furnish all land and all cattle and that defendant was to operate the venture for which he was to receive one-half of any net profits from the operation after deducting operating expenses. The defendant was to receive a guarantee of $500 per month, and any losses from the operation were to be plaintiff's." (Record-Civil No. 5800 file, pp. 82-83)

The part of the finding relating to profits is in direct opposition to the testimony of both Christensen and his wife, Maxine.

On direct examination, Christensen stated his understanding of the joint venture agreement. In response to a question regarding the terms of the operation, Christen-

sen stated: "Dr. Abbott was to buy the land and cattle. I was to be guaranteed $500 a month plus half the calf crop . . ." [Emphasis Added] (Tr. 65) On cross-examination, Christensen modified his testimony, stating, ". . .when the calf crop was sold, the ranch expense was to come out of the calf crop and we were to split what was left." (Tr. 75) This was reiterated on further cross examination, with the added statement that the agreement was never changed. (Tr. 75)

On direct examination, Maxine Christensen, the respondent's wife, answered in the affirmative when asked whether her testimony would "be in substance" the same as her husband's regarding the arrangements between Abbott and Christensen. (Tr. 339-340)

It is apparent that Christensen's testimony is in agreement with Abbott's contention and understanding that only profits from the sale of calves were to be shared. Abbott's own understanding of the agreement was elicited on direct examination: ". . .as we got some cows I would guarantee him [Christensen] a draw of $500 a month against net profit in the long run. As we ran more cows, then he would share in . . .the profits above . . .all expenses being taken out." (Tr. 57)

The final report of the special master attributes profits from the sale of sheep ($1,104), lambs ($3,082),

beef ($552), and fill dirt ($6,174) to the joint venture in the total amount of $10,992. (Report of special master- Civil No. 6169 file, p. 128).

Appellant respectfully urges this Court to hold that the weight of evidence clearly shows the agreement of the parties was to share only the profits from the sale of calves. Hence, that the profits attributed to the joint venture from the sale of sheep, lambs, beef, and fill dirt in the amount of $10,992.00 should be excluded from the final accounting of the parties.

POINT V.

THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT THAT ALL LOSSES FROM THE OPERATION WERE TO BE ABBOTT'S.

Abbott's testimony on direct examination presents his understanding of the original joint venture agreement (Tr. 57-59). In summary, he testified to (1) a $500 draw against profits by Cby the parties. This understanding was reinforced by Abbott's testimony on cross-examination. (Tr. 61, 62)

Christensen's testimony on direct examination presents his understanding of the original joint venture agreement (Tr. 65, 73). He testified to (1) Abbott's purchase of real property and livestock, (2) a $500 per month guarantee, (3) division of the calf crop after deduction of expenses, and (4) an agreement to make a

future agreement for an interest in the operation. This testimony was reiterated on cross-examination (Tr. 75). As was noted supra, Christensen's wife, Maxine, testified to the same understanding of the original joint venture agreement. (Tr. 339-340)

Upon reading the testimony of the parties, it can be seen that no understanding was reached regarding the sharing of joint venture losses. Therefore, absent any other facts to the contrary, it follows that Finding of Fact #2 regarding, ". . . any losses from the operation . . ." being attributed to Abbott has no factual support.

If the partners did not have an express agreement relating to the sharing of losses, how should the losses of the venture be distributed? This Court has supplied the answer, stating: "A joint venture should remain joint whether it results in a gain or a loss, unless the parties otherwise contract." Producer's Livestock Marketing v. Christensen, 588 P.2d 156, 158 (1978). In Producer's Livestock the parties had engaged in a joint venture similar to the instant case. Producer's Livestock put up the capital and the other party, Zane Christensen, furnished expertise in buying, feeding, managing, and selling cattle with an oral agreement to share profits. Ultimately, the venture incurred a loss. This Court determined that in the absence of an agreement to the con-

trary, losses must be shared by the joint venturers. Applying the Producer's Livestock logic to the instant loss, the joint venturers must share jointly in any losses.

The Abbott and Christensen venture was similar to, if not in reality, a partnership. Section 48-1-4(4), Utah Code Annotated, 1953, as amended, states that ". . . receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. . ." By agreement, Abbott and Christensen shared profits in their joint business.

Under partnership law, when there is no express agreement regarding the sharing or distribution of partnership losses, the law states that losses, whether capital or otherwise, are to be distributed in the same proportion as profits. 48-1-15(1), Utah Code Annotated. 60 Am Jur 2d 39. While Abbott does not here argue that the joint business constituted a partnership, Christensen has repeatedly referred to the joint venture as a partnership. (E.g., Record-Civil No. 5799 file, pp. 19-23) The similarity with a partnership tends to support application of partnership law requiring sharing of losses in the same proportions as profits.

Appellant respectfully requests this Court rule that all losses of the joint business should be shared equally between Abbott and Christensen and that the case be

remanded to the lower Court with instructions to make adjustments in accordance with this ruling.

POINT VI.

THE COWS REPLEVIED BY ABBOTT ARE ATTRIBUTABLE TO HIS CAPITAL CONTRIBUTION AND RIGHTFULLY BELONGED TO ABBOTT UNDER THE AGREEMENT TERMINATING THE JOINT VENTURE.

In the fall of 1973, the joint venture cows produced a number of calves that were held back from sale because calf prices were so low. (Tr. 86) The calves remained the property of the joint venture until it terminated. By the time the termination occurred, they had matured to adult cows and had produced calves of their own. (Tr. 241-242)

Abbott testified that inasmuch as the cows in the joint venture were to belong to him, the calves held over from 1973, now grown into cows, belonged to him. (Tr. 88) Further, he testified that Christensen was given credit for any interest he might claim in the now grown calves at the termination of the joint venture. (Tr. 89, 103)

Abbott demanded that Christensen turn-over the subject cows to him a part of the termination settlement. In response to Christensen's refusal, the cows were replevied by Abbott. (Tr. 89)

In the special master's report of October 8, 1980, Christensen is given credit for $9,620. (Record- Civil

No. 6169 file, pages 128-130) This amount represents the value that the special master placed on the replevied cows.

Appellant refers the Court to Plaintiff's Exhibit #81. This document represents Plaintiffs unrebutted testimony regarding the relative value of the real property which was divided among the parties upon termination of the joint venture. (Tr. 455) Table I, below, represents a tabulation of the difference between the cost of each property and remaining mortgage or contract balance at the time the joint venture was terminated.

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TABLE I
(Property Distributed to Christensen on Termination)

Property	Cost*	Mortgage Balance*	(Gain) Difference
Birch #1	$ 70,000.00	$ 61,096.00	$ 8,904.00
Birch #2	16,000.00	7,100.00	8,900.00
Zane C.	643,000.00	593,000.00	50,000.00
Lindsay	100,000.00	69,176.00	30,824.00
Reary	52,000.00	35,000.00	17,000.00
	Total Gain to Christensen		$115,628.00

* figures from Exhibit #81

- -

As can be seen, Christensen's gain on the termination is $115,628.00 based on cost. Based on market value (Table II, infra), the gain is $596,128.00.

TABLE II

(Property Distributed to Christensen on Termination)

Property	Market Value	Mortgage Balance*	(Gain) Difference
Birch #1	$315,500.00	$ 61,096.00	$254,404.00
Birch #2	40,000.00	7,100.00	32,900.00
Zane C.	765,000.00	593,000.00	172,000.00
Lindsay	160,000.00	69,176.00	90,824.00
Reary	81,000.00	35,000.00	46,000.00
	Total Gain to Christensen		$596,128.00

*figures from Exhibit #81

It is readily apparent that Christensen has been well compensated for any interest he claims to have in the cows which were replevied by Abbott. Even using Christensen's "gain" based upon "cost" ($115,628.00) from Table I, and less the $9,620.00 that the special master calculated, Christensen had a net gain of ($115,628.00 - $9,620.00) $106,008.00 from the real property distribution. Using Christensen's gain based on market value ($596,128.00) from Table II, Christensen had a net gain of ($596,128.00 - $9,620.00) $586,508.00.

To avoid an inequitable result, appellant urges this Court to affirm his ownership of the repleived cows and to hold that Christensen is not entitled to a credit for those cows.

POINT VII.

THE AWARD TO CHRISTENSEN FOR CARE OF ABBOTT'S COWS WAS IN CONTRAVENTION OF THE PARTIES AGREEMENT.

In the special master's report of October 8, 1980, Christensen is given a credit of $17,785.98 for the care and feeding of 185 cows that belonged to Abbott. The care and feeding took place in 1975 after termination of the joint venture between the parties. The special master's calculations were based upon figures elicited during the testimony of respondent's witness, Mr. Johnny Fausett. (Record- Civil No. 6169 file, pages 128-130)

Abbott testified that Christensen agreed to care for and feed the cows as part of the joint venture termination agreement. (Tr. 443-444) In support of this testimony, Abbott points to the more than generous termination settlement with Christensen. In that settlement, Abbott deeded real property to Christensen with a cost basis in excess of mortgages of $115,628.00, (Table I, supra) and a market value basis in excess of mortgages of $586,508.00. (Table II, supra)

Both parties agreed that Christensen was to care for the joint venture cows which were retained by Abbott, (Tr. 304,443) Christensen, however, denies that he was to care for the cows as part of the settlement agreement. (Tr. 304, 305) Christensen testified that he assumed Abbott would pay

him the same amount ($500.00 per month) that was being paid during the existence of the joint venture. (Tr. 258)

One of the duties undertaken by Christensen in caring for Abbott's cows was their feeding. Christensen testified that he fed the cows hay which was produced by the joint venture during 1974. (Tr. 254) Abbott testified that as part of the termination agreement the hay was to belong to him. He also testified that there was sufficient hay to provide for the cows during the winter. (Tr. 426)

Christensen's testimony was that the hay from the 1974 operation was to go to each party on a "prospective basis." (Tr. 248) This was in conflict with Abbott's testimony wherein he stated that "there was no reason to give any of it away [to Christensen] and then buy some more." (Tr. 426)

Abbott urges that the Court look to the equity of the real estate division and the fact that Christensen obtained a great deal of wealth from a minimal investment as a result of the termination settlement. It is entirely reasonable that Christensen was willing to give up the 1974 hay crop in exchange for the real property he received on termination of the joint venture.

POINT VIII.

ALTERNATIVELY, THE AWARD TO CHRISTENSEN FOR CARE OF ABBOTT'S COWS WAS EXCESSIVE AND UNJUSTIFIED.

In the alternative, Abbott argues that the special master overcompensated Christensen in calculating the costs of caring for the cows. The special master relied upon Johnny Fausett's testimony in calculating the costs. (Record-Civil No. 6169 file, pages 128-129) Mr. Fausett was apparently in the cattle raising business. He testified to being "responsible for 9,000 head of cattle" during 1975. (Tr. 123)

Abbott urges that the cost figures testified to by Mr. Fausett and used by the special master do not apply to the situation in the joint venture. First, Mr. Fausett was caring for 9,000 cattle versus the small number of cows cared for by Christensen. There is an obvious difference in the scale of operations including number of employees and amount of equipment. Further, Mr. Fausett's figures do not take into account the fact that Christensen used Abbott's hay to feed the cows. (Tr. 261)

If the Court disregards Abbott's contention that Christensen agreed to care for the cows as part of the settlement, it is inequitable to grant Christensen recovery on Fausett's figures. Christensen himself testified to the fact he assumed he would only be paid $500.00 per month while he was feeding the cows from the termination of the venture through May 20th (when the cows would no longer be on feed). (Tr. 258,263) He further testified that he used

both Abbott's and his own hay [from the Reary Place] and that no hay was purchased. (Tr. 261)

By Christensen's own testimony, he calculated three cows to a bale of hay per day. (Tr. 254) He further testified that he fed Abbott's 185 cows a little over 6,000 bales of hay. (Tr. 261,263) Christensen testified that a bale of hay was worth $1.50 at the time he cared for Abbott's cows. (Tr. 263) Based on these figures, Christensen fed Abbott's cows (6,000 x $1.50) $9,000.00 worth of "his own" hay. If Christensen is credited with $500.00 per month from January through May 20th, when the cows were taken off feed, he would accrue total monthly "guarantee" charges of $500.00 x 4 2/3 months = $2,334.00. The total feed costs ($9,000.00) and the total monthly "guarantee" ($2,334.00) equals $11,334.00. This is the greatest amount that could be allowed based on Christensen's own figures.

However, the Court should take into consideration the fact that Abbott's own hay was also used in feeding the cows. In 1975, May 20th was the 140th day of the year. If Christensen fed Abbott's 185 cows for 140 days at one bale per three cows, it would take 140 days x 185 cows = 25,900/3 cows per bale = 8,633 bales of hay.

Even if Christensen and Abbott had divided the joint venture hay equally, one-half of the hay fed to Abbott's cows was his own property and not chargable to him (no hay

was purchased to feed the cows). Thus, Christensen should only be credited with 8,633/2 = 4,316.5 bales of hay. At $1.50 per bale, this equals $6,474.75 for the hay. Adding the $2,334.00 total monthly "guarantee" to the $6,474.75 for the hay, the total credit is equal to $8,808.75.

Abbott urges that if Christensen is to recover anything for the care of Abbott's cows, the amount should not be based on Johnny Fausett's testimony. Rather, that recovery should be $8,808.75 based upon Christensen's own testimony, adjusted to give Abbott credit for the use of his own hay.

POINT IX.

UNDER UTAH LAW, CHRISTENSEN IS NOT ENTITLED TO THE 424 SHARES OF FARNSWORTH CANAL IRRIGATION COMPANY STOCK.

Abbott and Christensen are in dispute as to whether the contract of December 21, 1974 (Plaintiff's Exhibit 14) for sale of the Reary Place, with Abbott as Seller and Christensen as Buyer, included 424 shares of Farnsworth Canal Irrigation Company stock. Abbott testified that in personally preparing the contract, he purposely did not include the stock in the contract for sale of the real property. (Tr. 393) When Abbott prepared contracts dividing real property, he simply copied the original contract of purchase and made what changes he thought appropriate. He did this on all of the contracts. (Tr. 427-428)

The trial court in its preliminary findings, at the completion of trial and presentation of evidence, held that the contract of sale did not include the stock. (Tr. 518, 519) However, after submission of memoranda by counsel for the parties, (Record, Civil No. 5800 file, p. 62-80 and Civil No. 5799 file, p. 139-146) the trial court decided that "the parties thereto agreed and intended to agree that" the stock was included in the sale. (Record- Civil No. 5800 file, p. 83- FF#7)

Abbott submits that Christensen did not overcome the rebuttable presumption that water rights represented by shares of stock in a corporation do not pass to the grantee as an appurtenance to the land upon which the water right was used. Section 73-1-10, Utah Code Annotated, 1953, as amended, has been held to create such a presumption. Brimm v. Cache Valley Banking Co., 2 U.2d 93,99, 269 P.2d 859 (1954). Hatch v. Adams, 7 U.2d 73, 75, 318 P.2d 633 (1957). The relevant part of that statute reads:

> "Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land..."

This Court established the standard for overcoming the presumption when it stated that a grantee must show (1) by

"clear and convincing evidence" that the water right was appurtenant and, (2) that "the grantor intended to transfer the water right with the land, even though no express mention of any water right was made in the deed." Brimm, supra. at 99.

With respect to the first part of that standard, Christensen attempted to show that the water was appurtenant to the land through the testimony of Fred Lindsay, Secretary for the Farnsworth Canal Irrigation Company, (hereinafter Farnsworth). This was undertaken through questioning designed to determine how long the previous owners of the Reary Place had also owned stock in Farnsworth (Tr. 227) Insofar as that testimony is concerned, however, this Court stated:

> "We are of the opinion that proof that water represented by water stock was used on certain land by the owner of the land during the entire period of his ownership of the land is not alone sufficient to rebut the presumption that such water is not to be deemed apprutenant." Hatch, supra at 75-76.

Going further in his attempt to show the water should be deemed appurtenant, Christensen has argued that without water, the Reary Place is valueless and that no one would purchase such land without water. However, Abbott has testified without rebuttal that during the operation of the joint venture, the Taylor ranch in the same vicinity was purchased without water. (Tr. 391) He also testified that it was his

intention to transfer the water stock in question to the Taylor ranch after the ditches were repaired. (Tr. 392)

Except for Christensen's testimony noted above, the only evidence relating to the value of the Reary Place without water was Plaintiff's Exhibit 81.

However, Mr. Lindsay did testify to the value of the water stock at the time the Reary Place was transferred to Christensen. He estimated that value at $200.00 per share based on a sale in 1974. (Tr. 231) This means the total value of the water stock was $200 x 424 shares = $84,800.00. Obviously, the purchase price of $52,660.05 (Plaintiff's Exhibit 14) was not meant to include water stock which had a value more than one and one-half times greater.

The holding of the trial court that the water rights represented by the subject water stock was appurtenant to the land sold to Christensen is contrary to both the law and the facts.

Regarding Abbott's intention as to the water stock in question, Abbott testified that he intentionally did not include the water stock in the contract of sale for the Reary Place because of the terms of the joint venture termination agreement. Abbott's intention was to transfer the Reary water to the Taylor ranch. Abbott testified that Christensen was going to transfer part of his own water stock from the Birch Place to the Reary Place. (Tr. 391,392) Christen-

sen testified that he did, in fact, transfer 50 shares of water to the Reary Place. (Tr. 274,275)

In preparing contracts of sale for division of the joint venture real property, Abbott specifically included water stock with other parcels of real property which were transferred to Christensen. (Plaintiff's Exhibits 26 and 79) The fact that water stock was specifically included within the contracts for the other properties and not included in the contract for the Reary Place further shows Abbott's intention regarding the transfer of the stock in question.

In Christensen's memorandum opposing the trial Court's preliminary decision to disallow his claim for the stock, it is argued that the sale contract's reference to the Buyer's obligation to "pay all taxes and assessments" was indicative of Abbott's intent to include the water stock. However, when taken in context, as reproduced below, that phrase refers to assessments in the nature of taxes, such as special assessments for improvement districts or similar purposes.

> "TAXES
> The parties further mutally agree that the Seller shall pay all taxes and assessments of any kind and nature up to the time Buyer takes possession of said premises, which is Now in possession; that the Buyer shall pay all taxes and assessments thereafter and for so long as this contract shall remain in force." (Plaintiff's Exhibit 14)

Even if interpreted in the manner urged by Christensen, the contract of sale and escrow agreement in the instant case did not go so far as the contract and escrow agreement in Hatch, supra, where this Court decided in favor of the grantor's retention of water rights. In that case, the real estate contract and the escrow agreement contained the real property description and a statement "together with all buildings and improvements thereon and all water rights appurtenant thereto." [Emphasis added]

The deciding factor in Hatch, supra seemed to hinge upon the fact that there were other water rights transferred with the property.

> "If repondent had no other water than the 7 1/2 shares in question so that the reference to appurtenant water would not refer to any other water, there would be presented a different situation." (at 76)

In the instant case, water rights are not mentioned in the contract except on the second page under the heading: "Abstract of Title, Warranty Deed, Etc. The Sellers agree that they will deposit with this agreement the following instruments: Warranty Deed, Water Certificate, Bill of Sale." (Plaintiff's Exhibit 14)

With the escrow documents is a bill of sale for 30 shares of Farnsworth water. Abbott testified that this document was included in the escrow because Christensen had

agreed to trade Vera Birch "30 shares of water for 30 shares in an oil well." (Tr. 417)

It should also be pointed out that Christensen has other water available to transfer to the Reary Place. He had the following Farnsworth water rights at the time the joint venture property was divided: Birch #1, 351 shares; Birch #2, 35 shares; Lindsay Place, 392 shares; and, Zane Christensen Place, 1,964 shares. (Plaintiff's Exhibit 81)

The findings of fact entered by the trial court are inconsistant. Finding #6 is that the contracts between the parties dividing their interests in the joint venture real estate were "fully integrated." (Record, Civil No. 5800 file, p. 83) If the contracts were fully integrated, the court erred in considering parol evidence regarding the water rights. State Bank of Lehi v. Woolsey, 565 P.2d 413. Without the admission of parol evidence on the subject of water stock, the Court, in considering the contract, the statutes, and relevant case law, could only come to the conclusion that the water stock was not conveyed to Christensen.

Abbott respectfully urges that this Court find Christensen did not meet the burden imposed upon him to overcome the presumption created by Section 73-1-10, Utah Code Annotated, 1953, as amended, and that Finding of Fact #7 should be reversed.

CONCLUSION

The case was tried to the lower court as an accounting between joint venturers. In an accounting, this Court may, in exercise of its equity powers, review both questions of law and fact.

On appeal, the appellant is urging the Court to return the case to the lower court with the following instructions:

(1) Perform a full accounting in accordance with the stipulation of the parties, taking into account:

(a) the appellant's capital contributions to the joint venture;

(b) the distribution of joint venture property upon termination of the business;

(c) the appellant's $50,000 down payment on the Zane Christensen/Peterson Place property;

(d) the agreement of the parties that respondent was to share only in profits from sale of the joint venture calves; and,

(e) losses from the joint venture are to be shared equally.

(2) The cows replevied by Abbott belonged to him.

(3) Christensen should not be given an award for care of Abbott's cows after termination of the joint venture, in accordance with the party's termination agreement. In the

alternate, Christensen's award should be limited to $8,808.75, in accordance with his own testimony.

(4) Abbott is to retain the 424 shares of Farnsworth Canal Irrigation Company stock.

Abbott, in support of his argument that the Court should order a full accounting has cited the stipulation of the parties and Utah statutory and case law. This Court has held that in the distribution of assets in a joint venture, the Uniform Partnership Act (UPA) is controlling. Under the UPA, capital contributions of the joint venturers are considered liabilities of the venture. As such, in distribution of joint venture assets, they rank ahead of the distribution of profits owed to partners.

The accounting made by the special master did not include Abbott's capital contributions. It did, however, include Christensen's capital contributions. To not also include Abbott's capital contributions is inequitable.

Further, Abbott's expenditure of $50,000 as a down payment on the Zane Christensen/Peterson Place, was made in furtherance of the joint venture's business. This was a capital contribution for which Abbott should be given credit.

In calculating the profits and losses of the joint venture, the agreement of the parties should be controlling. The testimony of both Abbott and Christensen showed that Christensen was to share only in the profit from the sale

of calves (calculated after deduction of expenses of the joint venture). The agreement was silent on the sharing of losses.

Where an agreement is silent on the sharing of losses in a joint venture, this Court has ruled that joint venturers must share the losses. Further, Christensen's arguments that the business was a partnership and the similarity of a joint venture to a partnership support the application of partnership law in this case. That law requires sharing of losses in the same proportion as profits when the agreement is silent on allocation of losses

Abbott has shown the joint venture agreement allowed for sharing of profits from calve sales only between the parties. The cows which were replevied by Abbott belonged to him under the joint venture agreement and under the termination agreement. Abbott should not be forced to pay for his own property.

In the termination agreement, Christensen received a more than generous settlement for his interest in the joint venture. Abbott testified that, as part of that agreement, Christensen was to care for Abbott's cows during the winter and spring of 1975 without extra compensation. Further, hay from the joint venture was used to feed the cows. Abbott should not be required to pay for the care and feed when it

was part of the Christensen's duties under the termination agreement.

In the alternate, Christensen testified that he expected to receive compensaton of $500 per month in caring for the cows. Adding that amount to Christensen's claimed one-half interest in the joint venture hay, the maximum amount Christensen should receive for the cow's care is $8,808.75.

Under Utah statutory and case law, Christensen had the burden of proving that the 424 shares of Farnsworth Canal Irrigation Company stock was appurtenant to the Reary Place land that Abbott sold to Christensen. The test under that burden required him to (1) show by "clear and convincing" evidence that the water stock was appurtenant to the land and (2) show Abbott intended to convey the water stock even though no express mention of the water stock was made.

A review of the testimony and evidence shows that Christensen failed to meet the "clear and convincing" part of the test. Further, Abbott's intention not to include the water stock was well supported by the evidence and his testimony.

In addition, the lower court's finding of fact that the contracts prepared upon termination of the joint venture were fully integrated precluded the admission of parol

evidence to overcome the fact that the water stock was not included in the sale of the Reary Place to Christensen.

For the reasons stated above, Abbott respectfully submits that this Court should grant him relief on all issues raised on this appeal.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to George E. Mangan, Mangan & Gillespie, APC, P. O. Box 246, Roosevelt, Utah 84066 on this ___ day of November, 1981.

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